

3c
cyl
9

ORIGINAL COPY

NO. 82-5086

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

RECEIVED

AUG 18 1982

OFFICE OF THE CLERK
SUPREME COURT, U.S.

JAMES E. MESSER, JR.,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

MARY BETH WESTMORELAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3339

QUESTIONS PRESENTED

1.

Whether the state habeas corpus court properly relied upon an adequate and independent state ground thus precluding review of the issue presented.

2.

Whether the state courts properly determined that there was probable cause for the arrest of the Petitioner.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED.	i
STATEMENT OF THE CASE.	1
REASONS FOR NOT GRANTING THE WRIT	
I. THE STATE HABEAS CORPUS COURT PROPERLY RELIED UPON AN ADEQUATE AND INDEPENDENT STATE GROUND IN DENYING RELIEF ON THE ISSUE OF PETITIONER'S ARREST.	3
II. THE GEORGIA SUPREME COURT PROPERLY CONCLUDED THAT PETITIONER'S CONFESSION WAS ADMISSIBLE.	4
CONCLUSION.	7
CERTIFICATE OF SERVICE.	8

TABLE OF AUTHORITIES

Cases Cited:

Page(s)

Elrod v. Ault, 231 Ga. 750 (1974). 3

Messer v. Georgia, U.S. , 1981, 102 S.Ct. 367 (1981). 2

Messer v. State, 247 Ga. 316, 276 S.E.2d 15 (1981). 2, 5

Stembridge v. Georgia, 343 U.S. 541 (1952). 3

United States v. Ashcroft, 607 F.2d 1167 (5th Cir. 1979), citing Brinegar v. United States, 338 U.S. 160 (1949). 6

Statutes Cited:

Ga. Code Ann. § 27-2534.1(b)(2). 2

Ga. Code Ann. § 27-2534.1(b)(7). 2

Petitioner, James S. Messer, Jr., was indicted in York County, Georgia during the December Term, 1978 for the kidnapping with bodily injury and the murder of Shonda Taylor. (R. 71). A special plea of insanity was filed on behalf of the Petitioner, but psychiatric examinations concluded that Petitioner was mentally competent to stand trial and criminally responsible at the time of the crime. Subsequently, the special plea of insanity was withdrawn. (R. 74). Following a trial by jury, Petitioner was found guilty on both charges and sentenced to the death penalty. The jury found that the murder was committed while engaged in the commission of another capital felony, that

NO. 82-5086

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981**

JAMES E. MESSER, JR.,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA**

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, James E. Messer, Jr., was indicted in Polk County, Georgia during the November Term, 1979 for the kidnapping with bodily injury and the murder of Rhonda Tanner. (R. 21). A special plea of insanity was filed on behalf of the Petitioner, but psychiatric examinations concluded that Petitioner was mentally competent to stand trial and criminally responsible at the time of the crime. Subsequently, the special plea of insanity was withdrawn. (R. 34). Following a trial by jury, Petitioner was found guilty on both charges and sentenced to the death penalty. The jury found that the murder was committed while engaged in the commission of another capital felony, that

being kidnapping with bodily injury and that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture to the victim. See Ga. Code Ann. § 27-2534.1(b)(2) and (7). (R. 79-11).

A motion for new trial was subsequently denied and a notice of appeal was filed on June 11, 1980. On direct appeal, the Supreme Court of Georgia considered some six issues and considered the death sentences that were imposed. The court affirmed both the convictions and sentences. Messer v. State, 247 Ga. 316, 276 S.E.2d 15 (1981). Petitioner's motion for a rehearing was denied by that court on March 18, 1981.

After the decision of the Supreme Court of Georgia was rendered, the Petitioner filed a petition for a writ of certiorari in this Court. This petition was denied on October 5, 1981. Messer v. Georgia, ___ U.S. ___, 102 S.Ct. 367 (1981).

Petitioner then filed a petition for a writ of habeas corpus in the Superior Court of Butts County on January 5, 1982. Relief was denied by that court on February 23, 1982. The application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on April 20, 1982.

The instant application was then filed challenging the decision of the state habeas corpus court.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE STATE HABEAS CORPUS COURT PROPERLY RELIED UPON AN ADEQUATE AND INDEPENDENT STATE GROUND IN DENYING RELIEF ON THE ISSUE OF PETITIONER'S ARREST.

Petitioner has challenged the legality of his arrest and the admission of statements he alleges were made subsequent to that arrest. In considering this issue, the state habeas corpus court did not decide the question on the merits, but cited to the decision of the Supreme Court of Georgia on direct appeal. The court noted that the Supreme Court of Georgia had already determined that there was no merit to this allegation. Messer v. State, *supra*, at 319. The state habeas corpus court then concluded, "findings of the appellate courts are binding upon this Court for purposes of review. Elrod v. Ault, 231 Ga. 750 (1974)." (Habeas corpus order at 2.) Thus, the court whose decision Petitioner seeks to have this Court review did not address the issue on the merits, but relied on an independent state ground to deny relief.

This Court should not take jurisdiction to review an alleged federal constitutional question when the decision of the state court did not rest upon a federal ground, but rested upon an adequate and independent state ground. See Stembridge v. Georgia, 343 U.S. 541 (1952). The proper time to challenge the decision of the Supreme Court of Georgia on direct appeal was in the petition for a writ of certiorari following that decision, not in the present petition which is only appropriately addressed to the decision of the state habeas corpus court. The state

habeas corpus court did not address the merits of this claim as it was bound under Georgia law to the decision previously entered by the Supreme Court of Georgia. Thus, in the decision being challenged in the present case, the court relied upon an adequate and independent non-federal ground to deny relief.

**II. THE GEORGIA SUPREME COURT PROPERLY
CONCLUDED THAT PETITIONER'S CONFESSION
WAS ADMISSIBLE.**

In reviewing the question of probable cause in this case, it is essential to consider the pertinent facts presented.

On the morning of February 13, 1979, Rhonda Tanner, who was eight years old, left her home and went to elementary school in Cedartown, Georgia. Normally, Rhonda rode a bus to and from school; however, on that day, at approximately 2:30 p.m., the Petitioner, Rhonda's uncle, arrived at her school to pick her up. He was driving his own car identified as a 1966 Pontiac with tag number RUP-779. Petitioner told the school principal that Rhonda's father had been injured at his construction job and that her mother sent the Petitioner to pick up the little girl. Rhonda left school with the Petitioner and was never seen again.

When Mrs. Tanner became concerned at her daughter's failure to return home, she contacted the school principal. The principal described the man who picked up her daughter. Mrs. Tanner then contacted her mother-in-law and Petitioner's wife who stated she did not know any reason why the Petitioner would pick up Rhonda.

On February 13, 1979, Robin Slides was driving down Old Mill Road at approximately 3:35 p.m. and noticed a Pontiac parked on the side of the road near the railroad tracks. He saw a man walk away from the railroad tracks a few minutes later. He then reported the incident to the police the next day and identified Petitioner's car. The victim's body was subsequently discovered in this area.

On February 14, 1979, the school principal and two other witnesses from the elementary school identified a photograph of the Petitioner as the man who took Rhonda from school on the preceding day. At approximately 6:00 p.m. on February 14, 1979, G.B.I. Agent Longino, F.B.I. Agent Leary and Cedartown Police Officer Dean went to a trailer on Rockmart Highway to talk with the Petitioner. Petitioner voluntarily agreed to follow the officers to the police station where he gave a statement and signed a waiver to search his home. (T. 278, 364, 394, 398). He was not under arrest at that time. Petitioner subsequently made a confession at which time he was arrested by the authorities.

On direct appeal, the Supreme Court of Georgia made numerous factual findings. The court specifically found that Petitioner and his wife voluntarily accompanied G.B.I. Agents to the police station for questioning. The court also found that Petitioner was not under arrest at that time, even though he was given his Miranda warnings and did sign a waiver form. A confession was made only after the Petitioner was identified as the person who took his niece from the elementary school. The court found that Petitioner voluntarily accompanied the officers to the police station and was free to leave at any time. Messer v. State, 247 Ga. at 320. He was placed under arrest only after the confession was made.

The evidence at trial shows that Petitioner was advised by at least one officer that he was free to leave and was not under arrest. He went voluntarily to the police station in order to specifically make a statement. Further facts were developed which also showed probable cause to arrest prior to the time the statement was made. The police officers knew that Petitioner was the last one seen with the victim before her death. It was also known that the Petitioner concocted a story about the victim's father being injured in order to pick up the victim at school. Petitioner's car was also identified as having been in the location where the body was subsequently found. Thus, all of this evidence shows that there was a probable cause to arrest.

"Probable cause for an arrest exists where the facts and circumstances within the knowledge of the arresting officer and of which he had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." United States v. Ashcroft, 607 F.2d 1167, 1170 (5th Cir. 1979), citing Brinegar v. United States, 338 U.S. 160 (1949). The evidence should be viewed in a light most favorable to the verdict.

The evidence in the instant case shows that no arrest actually occurred until after the confession was made by the Petitioner. Therefore, his statement could not have been the product of any alleged illegal arrest. Furthermore, even had an arrest taken place prior to the time the confession was made, it is clear that there was probable cause to justify the arrest of the Petitioner before he made the confession based on the evidence the police received from other sources. Therefore, this Court should decline to grant review on this issue.


CONCLUSION

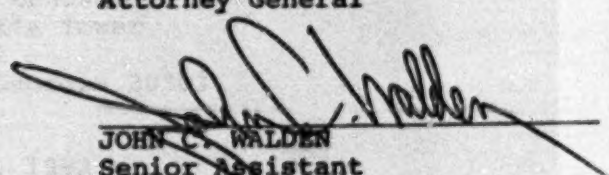
For the above and foregoing reasons, Respondent asserts that the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General


MARION O. GORDON
Senior Assistant
Attorney General


JOHN C. WALDEN
Senior Assistant
Attorney General


MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record

Please serve:

MARY BETH WESTMORELAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3339

CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this date served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing a copy of same in the United States mail with proper address and adequate postage to:

Howard J. Manchel
101 Marietta Tower
Suite 3311
Atlanta, Georgia 30303

This 17th day of August, 1982.

Mary Beth Westmoreland
MARY BETH WESTMORELAND
Counsel of Record for Respondent